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Supreme Court of the United States

OCTOBER, 1942, TERM.

No. 838.

LYMAN FLENIKEN AND MRS. LYMAN FLENIKEN, PETITIONERS,

VS.

GREAT AMERICAN INDEMNITY COMPANY, A CORPORATION, CAPITAL CITY PRESS, A CORPORATION, WM. WOLF BAKERY, INC., A CORPORATION, AND HARRY V. BOOTH, RECEIVER OF UNITED EMPLOYERS CASUALTY COMPANY, A CORPORATION, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

WILLIAM H. BECKER,
Columbia, Missouri,
Counsel for Petitioners.

BERT E. DURRETT,
CALVIN E. HARDIN, JR.,
Baton Rouge, Louisiana,
LEE CARL OVERSTREET,
BOYLE G. CLARK,
Columbia, Missouri,
Of Counsel for Petitioners.

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PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The opinion and judgment of the Court below are found in the Transcript of Record, pages 268-276, inclusive.

PROVISIONS OF FEDERAL CONSTITUTION, FEDERAL STATUTES AND OF LOUISIANA REVISED CIVIL CODE INVOLVED.

The following provisions of the Constitution of the United States, of the statutes of the United States and of the Louisiana Revised Civil Code are involved in this application:

Seventh Amendment to the Constitution of the United States:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law."

Section 34 of the Judiciary Act of September 24, 1789, 1 Stat. at L. 92, Ch. 20, 28 U. S. C. A., Sec. 725:

> "Sec. 725. Laws of States as rules of decision. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Sections 2317 and 2320 of the Louisiana Revised Civil Code:

> "2317. (2296) (N 1382). Liability as *Respondeat Superior*—Things in Custody.—We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications."
>
> "2320. (2299) (N 1384). Masters, Teachers and Artisans—Liability.—Masters and employers are answerable for the damage occasioned by their

servants and overseers, in the exercise of the functions in which they are employed. Teachers and Artisans are answerable for the damage caused by the scholars or apprentices while under their superintendence. In the above cases responsibility only attaches when the masters or employers, teachers and artisans might have prevented the act which caused the damage and have not done it."

SUMMARY STATEMENT MATTERS INVOLVED.

Your petitioner Lyman Fleniken and Mrs. Lyman Fleniken, citizens of Louisiana, show unto the Court the following facts, to-wit:

First: Your petitioners, in 1940, filed this suit for damages arising out of personal injuries in the United States District Court for the Eastern District of Louisiana against the Great American Indemnity Company, a New York insurance corporation (R. 6). The basis of the jurisdiction of the District Court was diversity of citizenship (R. 6, 10). The Great American Indemnity Company was sued as insurer of the Capital City Press (R. 9), a Louisiana corporation engaged in publishing and distributing two newspapers in Baton Rouge and vicinity, under a provision of the Louisiana Statutes authorizing direct action against the insurer (Act 55 of 1930). Under third party practice the Wm. Wolf Bakery, Inc., its insurer, United Employers Casualty Company, and the Capital City Press were made defendants (R. 25).

Second: Your petitioners seek damages for serious personal injuries sustained when a motorcycle on which they were riding was struck by an automobile owned by one Ewell and driven by one Neyland who was at the time delivering papers published by the Capital City Press to subscribers. Petitioners claim that Neyland who was driving for Ewell, a regular route carrier (with the knowledge and consent of the Capital City Press), was an em-

ployee of the Capital City Press which, with its insurer, would be liable for the acts of Ewell and Neyland, the carriers (R. 8).

Third: The cause was tried to a jury before Honorable Adrian J. Caillouet, District Judge (R. 82, 83). On motion the District Court directed a verdict for the respondents Wm. Wolf Bakery, Inc., and its insurer, United Employers Casualty Company, appearing through its Receiver Booth (R. 242, 243). A verdict was directed for the Capital City Press on procedural grounds (R. 243).

The jury returned a verdict for petitioner Lyman Fleniken in the sum of $20,454, and for petitioner Mrs. Lyman Fleniken in the sum of $2,000 (R. 243). Motion for new trial was denied by the District Court except for excessiveness of verdict, to cure which the petitioners under order of Court filed a joint remittitur resulting in judgment for petitioners against respondent, Great American Indemnity Company, as follows: For petitioner Lyman Fleniken, $14,698; for petitioner Mrs. Lyman Fleniken, $600 (R. 247-251).

Fourth: Briefly, with respect to the relationship between the Capital City Press (hereinafter referred to as "The Press") and Ewell and Neyland, the evidence was as follows: At the time of the accident Neyland was delivering papers of the Press on Ewell's regular route, as substitute carrier for Ewell (R. 117), with the knowledge and consent of the Press (R. 119-120). The Press advertised that carrier delivery was available to its subscribers (R. 104). Ewell and Neyland were operating under oral agreement with the Press (R. 94, 177), Papers were delivered daily by Ewell or Neyland to about 275 subscribers (R. 200) over a route about 150 miles long (R. 179), and were placed by them in delivery boxes which had been furnished by the Press (R. 98). The Press publishes two daily newspapers in the city of Baton Rouge (R. 121), both of which had been delivered over a certain specified route (R. 93) by Ewell since 1936 (R. 177) un-

til the time of the accident in May, 1940, and thereafter (R. 117-118). Ewell and other motor carriers were "under the jurisdiction of the circulation Manager of the Press (R. 92). The Press, desiring increased and wide circulation (R. 94), and feeling that it owed its advertisers the duty of covering the territory served by its motor carriers in the vicinity of Baton Rouge (R. 189-190), paid to the carriers the equivalent of a "car allowance" depending, in part, on the number of miles on the carriers' daily route (R. 98, 189). The carrier Ewell furnished his own car to carry the papers (R. 178-179). He was supplied the papers by the Press to deliver to subscribers from some of whom he collected, keeping the money he collected (R. 188-189, 217, 218); he was given free papers until the cost of the papers furnished monthly should equal the car allowance (R. 217, 218) (which it never did) (R. 188). Some subscribers subscribed and made payment for papers delivered by carrier, by direct dealings with the Press (R. 108). The Press reserved the right to terminate the arrangement and procure another carrier for the route if deliveries were not made in a satisfactory manner (R. 95-97, 126). The President of the Press Corporation testified that a "rather loose supervision" over the motor carriers was retained and exercised (R. 125-126.) The time, place and manner of delivery of papers were thereby subject to control by the Press. At the time of the accident the Press advertised in its papers that "Subscribers failing to get their papers readily will please notify circulation department over telephone 6121" (R. 104, 106). The Press kept a truck and salaried employes on duty at its plant to deliver papers to any subscriber on the route who failed to receive his paper and notified the circulation department by telephone (R. 103, 105). The Press paid no social security tax on the compensation paid to the carriers (R. 183). At the time of the accident, the carrier Ewell was buying bread from the respondent Wm. Wolf Bakery, Inc., and selling it, on his own account, to customers along the route (R.

200). He also handled dry cleaning on his own account (R. 204). The Press did not object to these activities, but if they should interfere with proper delivery of the papers, or if Ewell started handling anything "that made our papers secondary," the route would be taken from him by the Press (R. 192-193). In the policy of insurance issued by the respondent Great American Indemnity Company to the Press, Ewell, the carrier, was listed in the policy schedule as a "class one employee" along with other carriers and the chief officers of the Press Corporation (R. 72, 81).

Fifth: The cause was appealed to the Circuit Court of Appeals for the Fifth Circuit by the respondent insurer, Great American Indemnity Company (R. 252), which asserted on appeal that: (1) the petitioners failed to make a submissible jury case of employer-employee relationship; and, alternatively, (2) Neyland was also the employee of respondent Wm. Wolf Bakery, Inc., which with its insurer was jointly responsible for his acts (R. 257-258).

The Circuit Court of Appeals, speaking through Hutcheson, J., reversed the judgment of the District Court holding that the motion of the respondent, Great American Indemnity Company, for a directed verdict, should have been sustained, and holding that, as a matter of law, neither Neyland nor Ewell was a servant of the Press for whose actions it was liable, but that Ewell was an independent contractor in the operation of the route (R. 268-275). The judgment of the Circuit Court of Appeals reversed and remanded the cause for further proceedings not inconsistent with its opinion and taxed all costs of the appeal against the petitioners (R. 276). These costs were, in great part, due to the third party complaints filed by respondents Great American Indemnity Company and Wm. Wolf Bakery, Inc.

In its opinion, the Circuit Court of Appeals held (speaking of the motor carrier) that "if, on the other hand,

he was engaged merely, as the undisputed facts show here he was, to get something done which the person employing him wanted done, and the means of performing the work were left to him with no control over physical details as to the manner of performance, whether he is called agent or independent contractor, the person so contracting with him would not be liable for injuries growing out of the use of such means" (R. 275).

The petitioners had relied upon the two most recen Louisiana cases dealing with the liability of newspaper publishers for torts committed by their motor carriers while delivering papers. These cases were *Ravare* v. *McCormick,* (La. App. 1936), 166 So. 183, and *Gallaher* v. *Ricketts,* (La. App., 1939) 187 So. 351, reversed on Rehearing on other grounds, 191 So. 713, cert. granted Louisiana Supreme Court (See Appendix page 25). Writ vacated by stipulation of compromise February 5, 1940 (See Appendix page 26).

The Circuit Court of Appeals cited in support of its judgment only three Louisiana cases, but one of which dealt with the liability of newspaper publishers for torts of others [*Abate* v. *Hirdes,* (La. App., 1929) 121 So. 775, which was decided seven years earlier than the *Ravare case, supra*]. The Circuit Court of Appeals refused to apply the rule of the Louisiana cases relied upon by petitioners, stating (in speaking of the general rule with respect to independent contractors, as the "settled Louisiana rule") that:

> "The Louisiana Court of Appeals cases upon which appellees rely are not in conflict with the settled Louisiana rule. The facts completely distinguish them from the case at bar" (R. 275).

To justify the conclusion reached, the Circuit Court of Appeals cited many cases from jurisdictions other than Louisiana and some general statements of the American Law Institute's Restatement of the Law of Agency, and

directed the reader (R. 273-274) to "see the long list of cases cited in the *Denke case, supra*" (The Denke case being a Texas case which involved an insurance agent). These cases from foreign jurisdictions were distributed as follows:

Texas: three cases;
Michigan: one case;
Kentucky: one case;
Missouri: two cases;
California: one case;
Wyoming: one case.

Of these nine outstate cases, only five of them dealt with the liability of newspaper publishers for torts of its carriers.

The Circuit Court of Appeals, referred to and relied on Arts. 2317 and 2320, La. Rev. Civ. Code (R. 275). Petitioners submitted without avail that the construction and effect given these articles of the Civil Code by the Circuit Court of Appeals had been expressly denied in the jurisprudence of Louisiana, in the case of *Ragas* v. *Douglas*, (La. Sup., 1916) 139 La. 773, 72 So. 242, and in other cases.

Sixth: Petitioners instituted this proceeding to secure a review and reversal of the judgment of the Circuit Court of Appeals and to establish that the Circuit Court of Appeals has decided important questions of local Louisiana law in a manner which conflicts with the applicable local and Federal decisions, has deprived the petitioners of their right to jury trial guaranteed by the Seventh Amendment to the Constitution of the United States, and has wrongfully disregarded a jury finding upon an issue of fact when such finding was supported by competent evidence.